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A case against the defence of Single Economic Entities: Cartelisation of insurance companies in India

Gayatri Raghunandan · Wednesday, May 31st, 2017

On the 10th of July 2015, the CCI fined four public sector insurance companies (National Insurance Company Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd., and United India Insurance Co. Ltd.) for bid-rigging This fine arose in the context of the selection of an insurance provider with respect to the implementation of the *Rashtriya Swasthya Bima Yojna* ("RSBY") for the year 2010-11 in Kerala. The investigation followed an anonymous tip-off filed before the CCI, which submitted evidence showing that the four PSUs had acquiesced in sharing business via a meeting attended by the officials of the PSUs. It was further noted by the Director General ("DG") that although United India had won the tender, it was decided that the said tender would be shared by all four PSUs. In addition to this, an invocation of the exit clause year after year, led to re-tendering and inflated premiums. The companies raised a preliminary plea that they were exempted from the section 3 of the Competition Act, 2002 as they form a '*single economic entity*' with 100% shareholding vested with the Govt. of India, which controlled the management and affairs of the said companies. However, the Commission noted that the introduction of certain regulatory reforms showed that the four insurance PSUs acted independently of each other.

Recently, the Competition Appellate Tribunal ("COMPAT") upheld this order through a series of judgments, but reduced the penalty imposed. It relied on its earlier decisions and reduced the quantum of penalty to 1% of the relevant turnover of 3 years (the CCI had levied a penalty of 2%). This was done because the tribunal acknowledged that the companies were owned by the government and therefore, the burden of the fine would eventually fall on the public. It chose to calculate the penalty with reference to the gross premium received by United Indi. Additionally, the penalty imposed on the remaining parties was proportionate to their share in the premium. The single economic entity defence was rejected based on the evidence recorded. The companies had admitted before the DG that all decisions relating to submission of bids were taken without any prior approval from the Ministry of Finance. Hence the Govt. did not exercise any control over the four PSUs. This means that they cannot be said to constitute a 'single economic entity'.

A case against the defence of a Single Economic Entity ("SEE")

The evolution of the concept of 'single economic entity' can be traced back to as early as the 1960s when the European Commission introduced this concept in Mausegatt v. Haute autorité. In India, this concept has begun gaining momentum through its citation in various decisions taken by the Competition Commission of India.

In *Exclusive Motors Pvt. Ltd. v. Automobili Lamborghini S.P.A*, the CCI accepted the concept of single economic entity and opined that *"Agreements between entities constituting one enterprise cannot be assessed under the Act. This is with accord with the internationally accepted doctrine of 'single economic entity'…. As long as the opposite party and Volkswagen India are part of the same group, they will be considered as a single economic entity for the purpose of the Act"*.

In the appeal before COMPAT, it was observed that an internal agreement between subsidiaries, which are a part of the same group, cannot be considered as an agreement for the purpose of Section 3 of the Act, thereby endorsing the view of the CCI.

Similarly, in *Shamsher Kataria v. Honda siel & Ors,* the CCI observed that *"an internal agreement/arrangement between an enterprise and its group/parent company is not within the purview of the mischief of section 3(4) of the Act… At the same time, the Commission would like to emphasize that the exemption of single economic entity stems from the inseparability of the economic interest of the parties to the agreement. Generally, entities belonging to the same group e.g. holding-subsidiaries are presumed to be part of a 'single economic entity' incapable of entering into an* [anti-competitive] *agreement, the presumption is not irrebuttable."*

In the present case, the opposing parties argued that the Government of India held 100% shares of each of the companies i.e., National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd, and that the management and affairs of the companies are controlled by the Government of India through Department of Financial services (Insurance division), Ministry of Finance.

The acceptance of a theory of economic separation can serve the purpose of identifying inconspicuous anti-competitive practices adopted by subsidiary companies that may exist under the garb of a SEE. In the present case, the Director General's report stated that even though the overall supervision of the insurance companies was with the central government, each of the companies placed a separate bid in response to the tenders floated by the government. Further, it was also observed that the Ministry of Finance did not exercise *de facto* control over the business decisions of the companies and as such cannot be considered as a single economic entity. Ergo, the present case is a stark example of supervisory control as opposed to regulatory control on part of the Government of India.

On the question of loss experienced by the OP

It was submitted by National Insurance Co. Ltd. that the reasons for increasing the rate of the premium amount to Rs. 540 in 2010-11, Rs 827 in 2011-12 and subsequently Rs. 1600 in 2012-13 was a compensation for the loss that they had incurred in the previous years. However, it has been observed that such a claim is untenable as in a similar situation Reliance Insurance maintained a stable premium amount of Rs 738, without amounting to loss of any manner. The argument made by the learned counsel of the party that such amounts were mere quotations also has no bearing as the reason for such exorbitant quotations has in itself not been specified.

Non-cooperation with the DG

Since certain communication between the Dept. Of Finance and the Insurance companies had not been placed before the DG, an obstructionist approach has been taken by the Public Sector Insurance Companies ("PSIC").

On the question of bid-rigging on part of the companies

The evidence clearly established that the representatives of the companies met one day prior to the submission of bids and entered into an anti-competitive agreement to manipulate the tendering process for implementation of the RSBY schemes. In this context, United India received 70% of the premium and shared the remaining 10% with the remaining three PSUs. The conduct amounts to bid-rigging in violation of section 3(3)(d) of the Act[1]. Further, decisions relating to submission of bids, determination of bid amounts and business sharing arrangements were taken internally at the company level, without any ex ante-approval/directions from Ministry of Finance.

Conclusion

The decisions of the CCI and the COMPAT show us that a common shareholder, management or enterprise would not be sufficient for the SEE defence to apply. It is evident that the defence of "single economic entity" will be gauged on a transaction basis and not on an entity basis. A perusal of CCI orders in bid rigging cases over the last six years shows a hardening stance. The quotation of identical rates by bidders, despite different locations and different cost of production, has been considered sufficient for conviction, whether there is any other corroboration or not. The reduction of penalty imposed on the insurance companies, from Rs 6710 million to Rs. 20 million by the COMPAT provides relief to the companies and takes into account the larger issue of consumer welfare. The jurisprudence of the CCI with respect to cartels and bid rigging is evolving. It is interesting to note the shift towards de-recognising SEEs in order to establish individual liabilities on companies. It is hoped that the CCI will be consistent in its approach.

[1]**Competition Act, 2002**

S.3 (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation.—For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

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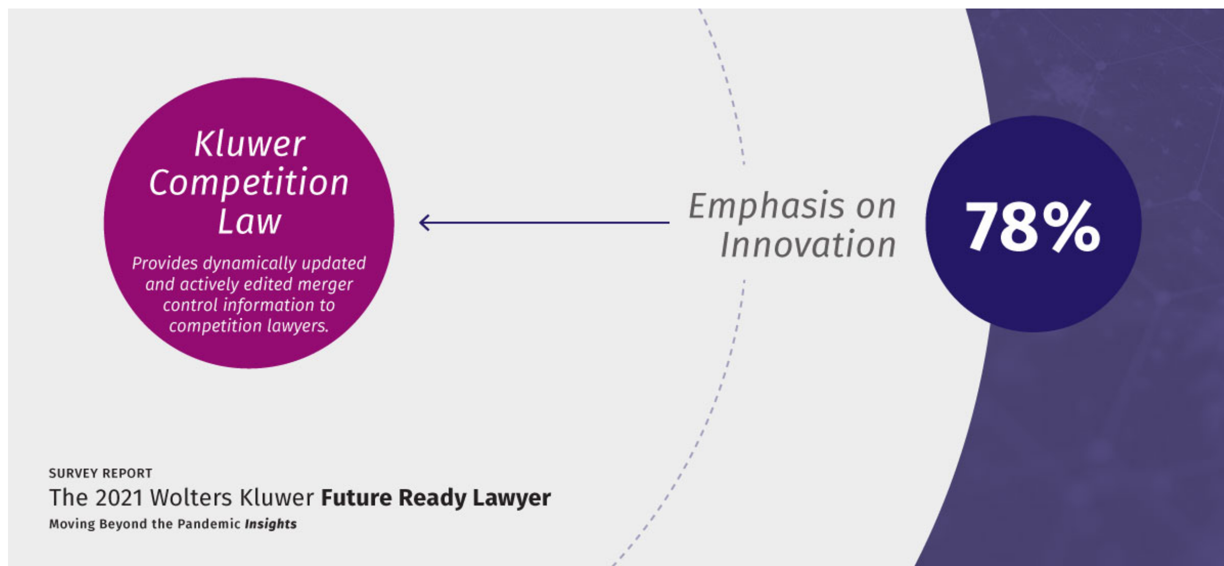

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